No. [redacted]38

In the Supreme Court of the United States

OCTOBER TERM, 1953

UNITED STATES OF AMERICA, PETITIONER

v.

PETER BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

CITATIONS

Cases:

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1953

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

PETER BROWN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above-entitled case on January 5, 1954.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the Southern District of New York (R. 22) is not reported. The opinion of the United States Court of Appeals for the Second Circuit (R. 29-31) is reported at 209 F. 2d 463.

JURISDICTION

The judgment of the court of appeals was entered on January 5, 1954 (R. 32). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an ex-serviceman who suffers injury as a result of negligent treatment in a Veterans Administration hospital and thereby becomes eligible for and receives federal compensation benefits "in the same manner as if such [injury] were service connected" may, in addition, maintain an action for damages against the United States under the Federal Tort Claims Act.

STATUTES INVOLVED

1. The Federal Tort Claims Act, 28 U.S.C. 1346(b), provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

2. Section 31, Act of March 28, 1934, 48 Stat. 526, 38 U.S.C. 501a, which extends to an ex-serviceman injured while hospitalized because of his former military service the same benefits as are granted to

servicemen for service-connected injuries, provides:

> Where any veteran suffers or has suffered an injury, or an aggravation of any existing injury, as the result of training, hospitalization, or medical or surgical treatment, awarded him under any of the laws granting monetary or other benefits to World War veterans, or as the result of having submitted to examination under authority of the War Risk Insurance Act or the World War Veterans' Act, 1924, as amended, and not the result of his misconduct, and such injury or aggravation results in additional disability to or the death of such veteran, the benefits of Public Law Numbered 2, of Public Law Numbered 78, and of this title shall be awarded in the same manner as if such disability, aggravation, or death were service connected within the meaning of such laws; except that no benefits under this section shall be awarded unless application be made therefor within two years after such injury or aggravation was suffered, or such death occurred, or after the passage of this Act, whichever is the later date. The benefits of this section shall be in lieu of the benefits under the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916, as amended.

STATEMENT

Respondent Peter Brown's left knee was injured in the course of his World War II military service (R. 13). Because of that injury he was honorably

discharged from the Army on August 6, 1944, and awarded monthly compensation benefits by the Veterans Administration (R. 9, 13).

Seven years later, in October 1951, while still receiving these Veterans Administration benefits of $15 per month,[1] Brown applied for and, "pursuant to his status as a veteran," was admitted to a Veterans Administration hospital in New York "for the purpose of having an operation performed on his left knee" (R. 3, 14). In preparing Brown for surgery, a Veterans Administration operating room attendant applied an allegedly defective tourniquet causing serious injury to certain nerves in Brown's left leg (R. 3-5, 14). The monthly Veterans Administration benefits were thereafter increased to $119.70,[2] and Brown has been receiving this sum each month since April 1952, shortly after release from the hospital (R. 15).

Brown's complaint against the United States under the Federal Tort Claims Act, filed on April 14, 1952, in the United States District Court for the Southern District of New York, asserted that the Veterans Administration employees were negli-

[1] The Veterans Administration informs us that prior to and at the time of his entry into the Veterans Administration hospital on October 1, 1951, respondent was receiving $15 monthly as disability compensation from the Veterans Administration.

[2] The Veterans Administration has advised us that effective April 22, 1952, respondent was awarded disability compensation at the rate of $119.70 per month and that he is currently receiving that monthly compensation. The Veterans Administration further informs us that $88.20 out of each $119.70 monthly payment represents the amount paid to respondent as compensation for the injuries sustained by him at the Veterans Administration hospital in October 1951.

gent in using the defective tourniquet (R. 2-4, 14). The United States answered, denying negligence on the part of the Government (R. 6). It also moved to dismiss the complaint "on the ground that * * * [respondent's] exclusive remedy is the compensation statute, 38 U.S.C.A. 501a," *supra*, pp. 2-3 (R. 10, 15). This motion, the district court stated, raised "the question whether a discharged veteran who has suffered further injury as a result of treatment of service incurred injury in a Veterans Administration Hospital and is receiving additional disability benefits for the resulting injury may recover under the Federal Tort Claims Act" (R. 22). Noting "a square conflict of authority on this point," the district court accepted "the reasoning of" *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D.C.), granted the Government's motion, and dismissed the complaint (R. 22, 23).

On appeal, the Court of Appeals for the Second Circuit reversed (R. 29-31). While recognizing that the *ONeil* decision "favors the government's argument," the Second Circuit refused to follow it and held instead that Brown's eligibility and receipt of compensation benefits from the Veterans Administration for the same injuries for which he filed the Federal Tort Claims Act suit did not bar that suit (R. 31).

REASONS FOR GRANTING THE WRIT

The issue presented in this case is whether an ex-serviceman, who is negligently injured at a Veterans Administration hospital and thus becomes

eligible for administrative benefits under the same comprehensive and generous system of special statutory benefits available to military personnel for their service-connected injuries, may maintain an action against the United States for additional damages under the Federal Tort Claims Act. The court below has resolved this important and constantly recurring issue by holding that the ex-serviceman *may* recover additional damages under the Federal Tort Claims Act, despite his eligibility for the administrative benefits under the comprehensive plan. This holding is in direct and admitted conflict with *O'Neil* v. *United States*, 202 F. 2d 366, where the Court of Appeals for the District of Columbia Circuit held that because of the existence of the statutory benefit system the Federal Tort Claims Act must be interpreted to exclude tort claims of ex-servicemen based on Veterans Administration hospital malpractice. The need for review of the holding below is further emphasized by the fact that the conflict in decisions was precipitated by the refusal of the court below to give proper effect to this Court's holdings in *Feres* v. *United States*, 340 U.S. 135, and *Johansen* v. *United States*, 343 U.S. 427.

1. In *Feres* v. *United States*, 340 U.S. 135, the Court ruled that the existence of an administrative compensation system for death and injury of servicemen bars an action for additional damages under the Federal Tort Claims Act. Holding the Act inapplicable to servicemen's claims because a "comprehensive system of relief had [theretofore] been

authorized for them and their dependents by [prior] statute," the Court stated (340 U.S. 135, 140):

> The primary purpose of the [Federal Tort Claims] Act was to extend a remedy to those who had been without; if it incidentally benefited those already well provided for, it appears to have been unintentional.

Showing that that purpose would in no way be served by affording servicemen alternative relief under the Tort Claims Act, the *Feres* opinion emphasizes the "bearing upon it [of] enactments by Congress which provide systems of simple certain, and uniform compensation." 340 U.S. 135, 144.

The express terms of Section 31 of the Act of March 28, 1934, 38 U.S.C. 501a, *supra*, pp. 2-3, extend to ex-servicemen injured at Veterans Administration hospitals the identical benefits of the comprehensive and uniform compensation system available to veterans for service-connected injuries. Section 31 states that the ex-serviceman is to be awarded "benefits * * * in the same manner as if [his Veterans Administration injury or] disability, aggravation, or death were service connected." The extent of the Veterans Administration benefits thus made available to ex-servicemen is illustrated by benefit payments which have been paid and will continue to be paid to respondent for the injuries sustained by him at the Veterans Administration hospital in October 1951. For the twenty-two-month period since his release from the hospital in April 1952, the $119.70 monthly pay-

ments received by respondent total more than $2,600. Of this amount, $1,940 have been paid to him because of the injuries he sustained at the hospital.[3] Moreover, on the basis of his life expectancy, it is estimated that the total monthly compensation benefits to be paid by the Veterans Administration to respondent because of his hospital injuries will aggregate more than an additional $42,000.[4]

Since the basis for the exclusion in the *Feres* case of servicemen's injuries from the Tort Claims Act is the existence of the comprehensive and generous system of special administrative benefits for their injuries and since a closely related system is, as we have shown, fully available to respondent for his Veterans Administration hospital injuries, it follows that the instant claim must also be viewed as outside the coverage of the Federal Tort Claims Act. The Court of Appeals for the District of Columbia Circuit has so held in passing on this specific problem in *O'Neil* v. *United States*, 202 F. 2d 366. There, the court, recognizing that *Feres* stands for the proposition that the existence of this comprehensive and generous scheme of special adminis-

---

[3] $1,940.40 is the product of 22 x $88.20, the portion of each monthly payment paid to respondent as compensation on his Veterans Administration hospital injuries. See footnote 2, *supra*, p. 4.

[4] The $42,000 estimate is based on the receipt of $88.20 per month over an expected life span of 40 years for a 30-year-old man. Statistical Abstract of the United States, 1953 (H. Doc. No. 99, 83d Cong., 1st Sess.), Expectation of Life Table, p. 69. See footnotes 1 and 2, *supra*, p. 4, and footnote 3, *supra*, this page.

trative benefits precludes resort to a tort action against the United States, held that the ex-serviceman's eligibility for compensation benefits for his Veterans Administration hospital injuries barred his Tort Claims Act suit (202 F. 2d 366, 367):

> * * * we think the basic principle of the [*Feres*] case covers this appeal. In Johansen v. United States, 343 U.S. 427, 539, 440, 72 S. Ct. 849, 856, 96 L. Ed. 1051 the Court said: "There is no reason to have two systems of redress. * * * This Court accepted the principle of the exclusive character of federal plans for compensation in Feres v. United States * * *."

This Court's decision in *Johansen* v. *United States,* 343 U.S. 427, cited in the *O'Neil* opinion, confirms the fact that the District of Columbia Circuit correctly understood and applied the *Feres* holding in excluding from the Tort Claims Act ex-servicemen's claims for negligent Veterans Administration hospital treatment. In *Johansen,* the Court held that the administrative benefits available under the Federal Employees Compensation Act precluded a government employee from suing the United States under the Public Vessels Act, even though at the time of the injuries there was no express declaration in the Federal Employees Compensation Act that its remedies were exclusive. Relying on *Feres,* and as if to eliminate all doubt that this Court viewed its *Feres* holding as being based on the "exclusive character" of the compen-

sation system, the *Johansen* opinion states (343 U.S. 427, 440, 441):

> * * * This Court accepted the principle of the exclusive character of federal plans for compensation in *Feres* v. *United States*, 340 U.S. 135. Seeking so to apply the Tort Claims Act to soldiers on active duty as "to make a workable, consistent and equitable whole," p. 139, we gave weight to the character of the federal "systems of simple, certain, and uniform compensation for injuries or death of those in armed services." P. 144. Much the same reasoning leads us to our conclusion that the Compensation Act is exclusive.
>
> * * * * *
>
> * * * As the Government has created a comprehensive system to award payments for injuries, it should not be held to have made exceptions to that system without specific legislation to that effect.

Despite the Court's statement in *Johansen* that *Feres* "accepted the principle of the exclusive character of federal plans for compensation," the opinion below brushes both *Feres* and *Johansen* aside as being "not in point" and "inapposite" (R. 31). It then goes into direct conflict with *O'Neil*, which, like *Johansen*, was based on this Court's decisions in *Feres*.

The only justification offered by the court below for its refusal to follow *Feres*, *Johansen*, and *O'Neil* was that the principle of exclusiveness of the administrative compensation plan bars only those soldiers who are injured in the performance of

their duty and hence does not preclude an ex-serviceman from maintaining a Federal Tort Claims Act suit for his post-service injuries. But *Feres*, being based on the "exclusive character" of the federal compensation plan, may not be given such a restricted reading. To the contrary, the reach of the *Feres* case is coextensive with the existence and availability of the administrative compensation plan. Moreover, the *Johansen* decision shows that the principle of exclusiveness of the compensation plan applies not only to servicemen but to civilian employees and in all situations where the plaintiff is eligible for the benefits of a comprehensive plan. And, with the exception of the decision below, the courts of appeals have recognized that the basis of the *Feres* and *Johansen* decisions was the acceptance of the exclusive character of the federal compensation plan and not the particular status or duty performed by the plaintiff at the time of his injury. See *O'Neil* v. *United States*, 202 F. 2d 366 (C.A. D.C.); *Lewis* v. *United States*, 190 F. 2d 22 (C.A. D.C.), certiorari denied, 342 U.S. 869; *Johansen* v. *United States*, 191 F. 2d 162 (C.A. 2),[5] affirmed, 343 U.S. 427; *United States* v. *Firth*, 207 F. 2d 665 (C.A. 9); *Sasse* v. *United*

---

[5] Judge Frank, who wrote the opinion below, dissented from the majority view of the Court of Appeals for the Second Circuit in *Johansen*. 191 F. 2d at 163. This majority view was explicitly affirmed by this Court when the *Johansen* case came before it and "the reasoning of *Johnson* v. *United States*, 4 Cir., 186 F. 2d 120," on which Judge Frank based his dissent (191 F. 2d 163), was rejected by this Court at that time (343 U.S. 427, 439). Judge Frank's opinion below in the instant case resembles the views he expressed as a dissenter in *Johansen*.

States, 201 F. 2d 871, 873 (C.A. 7).[6] The opinion below conflicts, we submit, with all of these decisions.

2. The question presented here recurs constantly in the heavy volume of litigation against the United States under the Federal Tort Claims Act and, in the absence of an authoritative decision by this Court, will continue to arise, with opportunity for veterans to select favorable forums.[7] Veterans Administration malpractice actions filed by ex-servicemen are now pending in at least six different district courts throughout the country. Additional cases involving the proper scope of this Court's decision in *Feres* are now before several other lower courts. If it left unresolved, the conflict between the decision below, on one hand, and the *O'Neil* decision and those of the other courts of appeals, on the other hand, will doubtless result in uncertainty and difference in treatment of similar cases by the district courts.

---

[6] *Santana* v. *United States*, 175 F. 2d 320 (C.A. 1), relied on in the opinion below, was decided before, and without the benefit of, this Court's decisions in *Feres* and *Johansen*. See *O'Neil* v. *United States*, 202 F. 2d 366, 367 (C.A. D.C.). *Santana* was based on this Court's earlier decision in *Brooks* v. *United States*, 337 U.S. 49. If certiorari is granted, we reserve the right to urge that while the Court's opinion in *Feres* sought to preserve *Brooks*, the reasoning of the *Feres* opinion undermines that upon which *Brooks* rests.

[7] A Federal Tort Claims Act plaintiff may sue in the judicial district where the act complained of occurred or, at his option, in the judicial district in which he may reside. 28 U.S.C. 1402(b).

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 292515 1080